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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 64

ELMER E. MILLS and LOUIS SUSMAN,
Petitioners,

vs.

THE ELECTRIC AUTO-LITE COMPANY, MERGENTHALER LINOTYPE COMPANY and AMERICAN MANUFACTURING COMPANY, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents' Brief

QUESTIONS PRESENTED

The questions presented for review by this Court are:

1. Whether a merger proxy statement is materially misleading where all necessary disclosures are contained within the document, but the recommendation of the board of directors that the merger be approved is set forth in boldfaced type.

2. Whether a finding that a proxy statement should have been phrased differently establishes the right to summary judgment, without giving consideration, as required by Proxy Rule 14a-9, to the circumstances under which the statement was made.

3. Whether shareholders would be better protected by a rule requiring persons having knowledge of defects in proxy material to take prompt action or by a rule, as suggested by the government, imposing automatic liability without regard to diligence in prosecuting claims.

4. Whether the finding of a defect in a proxy statement requires the voiding of a consummated transaction and the unwinding of a merger, irrespective of the effect of such relief on the interests of the shareholders.

STATEMENT OF THE CASE

Because the facts and circumstances surrounding the merger transaction have not been adequately presented and because the facts are crucial to a resolution of this case, we summarize them below.

Facts And Circumstances Surrounding The Merger

On June 4, 1963, The Electric Auto-Lite Company ("Auto-Lite") mailed to its shareholders a proxy statement and notice of a special shareholder meeting, scheduled for June 27th, for the stated purpose of voting upon a proposed merger of Auto-Lite into Mergenthaler Linotype Company ("Mergenthaler"). (A. 27-134, 476.)

The merger arose in the following context.

Auto-Lite's position in a changing market.

As the proxy statement explained, Auto-Lite had been principally engaged in the manufacture and sale of automotive parts and equipment. (A. 51.) Its sales volume and profits were tied to and reflected the fluctuating automotive market. (A. 42, 52.) In addition, Auto-Lite's market position was threatened by a growing trend on the part of the "big three" to manufacture their own parts necessary in the production of new cars. They also began distributing replacement parts for other makes of cars in addition to their own. Auto-Lite's own customers were emerging as its competitors. (A. 394-96, 596.)

In 1960, Chrysler Corporation, for many years Auto-Lite's principal customer, began making major electrical parts which it had previously bought from Auto-Lite. Auto-Lite's sales to Chrysler declined from 35% of total sales in 1958 to 12% in 1962. (A. 53.)

In light of these adverse competitive conditions, the company in 1961 sold the "Auto-Lite" trademark together with most of its distribution organization for replacement parts to Ford Motor Company. (A. 56.)

Mergenthaler—54% shareholder of Auto-Lite.

As the proxy statement disclosed, Mergenthaler had begun to purchase Auto-Lite stock in 1957. By 1963 Mergenthaler owned a controlling interest, 54% of the outstanding shares, and Auto-Lite had become its "consolidated subsidiary." (A. 30, 32, 34, 51, 76.)

Mergenthaler had for many years been the leader in the production of linotype machines and had an established reputation in the graphic arts field. Unlike Auto-Lite, Mergenthaler operated within a stable industry. (A. 61-62.)

Business reasons for the merger.

Mergenthaler had a world-wide network of distributors with offices in 111 countries and territories and could use its position in the foreign market to develop Auto-Lite's international sales in the automotive equipment field. (A. 30, 62.) Auto-Lite's position in the equipment leasing field would be advantageous to Mergenthaler in leasing graphic arts products. (A. 30.) The combined companies could be more efficiently operated and effectively administered under unified management and would provide the shareholders with a greater degree of balance and diversification. (A. 30.) The merger thus made good economic sense.

Immediately prior to the merger, Auto-Lite had the lowest profit to asset ratio of 22 leading auto parts manufacturers. (A. 621-22, 627.) The Auto-Lite board was advised by independent consultants that: ". . . the merged company, by combining its talents, may help [Auto

Lite] to expand its automotive business in foreign markets and to diversify into new products where the rate of earnings on sales is higher than that now experienced." (A. 625.)

Fairness Of The Merger Terms To The Minority Auto-Lite Shareholders

Mergenthaler proposed to merge at an exchange ratio which would give the minority Auto-Lite shareholders a premium. (A. 560-63, 610-11.) In order to obtain an independent analysis of the merger terms, the Auto-Lite board retained Standard Research Consultants, Inc., a division of Standard and Poor's Corporation. Standard Research advised the board that the stock to be received in the merger exchange would be "worth more on an intrinsic investment basis" than the value of the Auto-Lite stock surrendered and that the merger ratio was "fair and equitable and in the best interests" of the minority Auto-Lite shareholders. (A. 591, 611.)[1]

Based upon this advice and their own knowledge of the company, the Auto-Lite directors approved the merger. They took this action in the belief, subsequently confirmed by the market price of the stock of the merged company, that the merger would benefit the corporation and its shareholders. (A. 652-74.)

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[1] Standard Research's conclusion was based on the following factors, among others: (1) the Auto-Lite shareholders would receive convertible preferred stock with increased dividends in the merged corporation; (2) Auto-Lite's stock was vulnerable and had a "pronounced downside risk potential" because of the company's inferior profit performance; and (3) the conversion privilege of the preferred stock presented a good capital gain opportunity. (A. 611.)

Disclosures Contained In The Proxy Statement

The proxy statement contained an exhaustive and accurate financial description of the two companies and the terms of the proposed merger. (A. 34-93.)

Because the court rulings below turned upon the manner of the disclosure of the relationship between Auto-Lite and Mergenthaler, we list below the disclosures made on this issue:

1. Mergenthaler owned 54% of the Auto-Lite stock and intended to vote its stock in favor of the merger. Mergenthaler's controlling interest in Auto-Lite was set forth both in terms of the total number of shares owned and on a percentage basis. (A. 30, 51.)[2]

2. Since 1962 Auto-Lite had been a "consolidated subsidiary" of Mergenthaler. This fact was referred to throughout the proxy statement. (A. 34, 35, 38, 39, 61, 63, 65, 71, 74, 76, 77, 78, 79, 81.)

3. Mergenthaler and Auto-Lite for some time had four common directors—Mr. Pulleyn since 1962, Messrs. Keller and McAlpin since 1960, and Mr. Wattles since 1957. Three pages in the proxy statement were devoted to this subject. This information was set forth both in tabular and textual form. (A. 49-51.)

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[2] Mergenthaler's controlling stock interest in Auto-Lite was no surprise to the Auto-Lite shareholders. In 1962, Mergenthaler had obtained majority control by a voluntary exchange offer to the Auto-Lite shareholders. (A. 32, 44, 57, 76.) In the exchange offer, the Auto-Lite shareholders were informed that: "Mergenthaler's ownership in [Auto-Lite] is now of such significant proportions that Mergenthaler believes it desirable to acquire a majority interest in [Auto-Lite] in order to obtain the benefits accruing to a majority stockholder."

4. American Manufacturing Company ("American") and its President, Gurdon W. Wattles, owned 33.41% of Mergenthaler stock and no person other than Mergenthaler owned more than 10% of the stock of Auto-Lite. (A. 51.)

5. Four directors of Mergenthaler, including Messrs. Pulleyn and Wattles, had been officers, directors and shareholders of American. Mr. Wattles was simultaneously Chairman of the Executive Committee of Auto-Lite, Chairman of the Board of Mergenthaler and President of American. (A. 51.)

6. Mergenthaler had "majority control" of and a "controlling stock interest" in Auto-Lite. (A. 34, 76.)

On page 2 of the proxy statement, three sentences after the disclosure that Mergenthaler owned 54% of Auto-Lite and intended to vote in favor of the merger, the shareholders were told in a single boldfaced sentence that the Auto-Lite board recommended approval of the merger. (A. 30.)

Petitioners' Failure To Seek Prompt Corrective Relief

Three weeks before the scheduled shareholder meeting, petitioners (owners of 600 of 1,160,565 outstanding Auto-Lite shares) received their copies of the proxy statement. (A. 809, 864-65.) Petitioners immediately retained counsel experienced in securities litigation. (A. 804-05, 813-15, 816, 862.) "Several weeks" before the scheduled shareholder meeting, it was decided that a lawsuit would be filed. (A. 829.)

Petitioners waited until 49 minutes before the close of business on June 26, 1963, the day before the scheduled shareholder meeting, to file their complaint. Suing deriv-

atively and on behalf of all Auto-Lite shareholders—not one of whom has joined their litigation—petitioners contended that the proposed merger and the proxy material distributed in connection with it violated both state law and Rule 14a-9 promulgated under Section 14(a) of the Securities Exchange Act. 15 U.S.C. § 78n(a) (1964); 17 C.F.R. 240.14a-9. Paragraph 10 of their complaint specifically objected to the use of boldfaced type in setting forth the directors' recommendation. They also complained that the control relationship between Auto-Lite and Mergenthaler was inadequately disclosed. (A. 7-8.)

Petitioners did not notify Auto-Lite management of their objections prior to the shareholder meeting. (A. 829.) They did not request that management correct any alleged errors in the proxy material. They did not seek to have the meeting postponed so that they might distribute their own material. They did not seek redress from the staff of the Securities and Exchange Commission ("SEC"). And they did not seek a judicial postponement of the shareholder meeting. The Auto-Lite management did not receive actual notice of the filing of the suit until after the shareholder meeting. The decision not to seek a temporary restraining order was made deliberately, for tactical reasons, and not for want of time. Counsel for petitioners informed the District Court that it was his experience as counsel in securities cases which led him deliberately to avoid seeking preliminary relief. (A. 832.)

At the shareholder meeting, over 5,000 minority Auto-Lite shareholders returned proxies. Approximately 96% of the shareholders voting favored the merger. (A. 476-77, 1012.)

The District Court's Disposition Of This Case By Summary Judgment

In May, 1965, two years after filing their complaint, petitioners moved for summary judgment as to part of Count II, which charged a federal securities violation.[3] They attached to the motion material relating to an Investment Company Act proceeding held before the SEC in which American obtained an exemption from the Act on the finding that it controlled Mergenthaler and, through it, Auto-Lite.[4] These proceedings referred to a fact never disputed, that Mergenthaler was in a control relationship to Auto-Lite. Based upon this material, petitioners claimed that the proxy statement did not adequately disclose Mergenthaler's "control" over Auto-Lite. (A. 210-12.)

Respondents contended that a complete disclosure of the relationship between the corporations had been made in the proxy statement. In response to petitioners' charge that the Auto-Lite board acted against the best interests of the Auto-Lite shareholders, respondents submitted affidavits of every Auto-Lite director, each stating that he

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[3] Count I of the complaint charged common-law fraud. (A. 163-77.) Count III alleged that the merger was *ultra vires* under Ohio law. (A. 180-83.)

[4] In March, 1963, the SEC entered a published opinion and order (41 S.E.C. 415; Invest. Co. Act Release No. 3649), finding that American, through Mergenthaler's majority stock ownership, "controlled" Auto-Lite as that term is defined under the Investment Company Act. (A. 418-30.) Under the Act, any company which owns more than 25% of the voting stock of another company is "presumed to control such company." 15 U.S.C. § 80a-2(a)(9) (1964). Two months later, the SEC reviewed and cleared the Auto-Lite proxy statement involved here.

had exercised his independent judgment in analyzing and approving the merger and that the terms were not dictated to him by Mergenthaler or American. (A. 652-74.)

On November 15, 1965, the District Court granted petitioners' motion for partial summary judgment. (A. 441-54.) The court made no finding that the extensive financial and background information relating to the terms of the merger was in any way incorrect. The court did find, however, that the proxy statement did not adequately reveal the "control" relationship between Auto-Lite and Mergenthaler. Over respondents' objections, the case was referred to a Master to determine relief. (A. 456-59, 723-25.)

On February 14, 1966, the District Court held that its prior opinion was not a summary judgment ruling, but a "specification of facts appearing without controversy" pursuant to Rule 56(d). (A. 464.) The court held that it was required to "determine whether there was a causal connection between the finding that there has been a violation of the disclosure requirements of §14(a) and the alleged injury to the plaintiffs. . . ." (A. 463.) On June 16, 1966, it set the matter for trial, ruling that it could not decide the case until it had obtained a "complete view of the entire transaction." (A. 472, 889.)

On July 12, 1967, petitioners moved for "supplemental" summary judgment, asserting that they had established the requisite causal relationship by showing a point never contested: that some votes obtained through the proxy solicitation were necessary to achieve two-thirds approval of the merger. (A. 522-24.)

In opposition to petitioners' motion, respondents resubmitted the directors' affidavits (A. 652-74) as well as the Standard Research studies described in the proxy statement. (A. 568-639.) Respondents also submitted the affi-

davit of Professor James H. Lorie of the University of Chicago Business School and Director of the Center For Research In Securities Prices, who appraised the value of the Auto-Lite stock to determine the fairness of the merger terms. (A. 560-63.) On the basis of a formula widely used in the financial community, he concluded that the merger exchange ratio was fair to the Auto-Lite shareholders since "the value received . . . was in excess of the intrinsic value or inherent worth of the Auto-Lite stock surrendered." (A. 563.)

Respondents submitted affidavits of representative Auto-Lite shareholders who stated that they understood the control relationship existing between Mergenthaler and Auto-Lite, that they were not misled, and that they believed the terms were fair and beneficial and wanted the merger to stand. (A. 644-51.)

None of the material filed in opposition to the summary judgment motion was controverted by petitioners.

The District Court granted "supplemental" summary judgment as to liability on Count II on September 26, 1967. It held that a causal relationship had been established because

> "the areas of industrial activity linked by the merger are so inherently unrelated as to cause the new corporation to fall in that category of business enterprises as referred to recently by the Supreme Court as constituting a conglomerate merger, and to be inherently dangerous to a healthy economy." (A. 682-83.)

No party argued in support of this theory in either court below.[5] Nor do petitioners or the government as amicus raise it here.

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[5] The court's antitrust ruling was unexpected: ". . . I have finally come up with a determination of what the Supreme Court [in *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964)] had in mind. . . . It is not what any of us have been thinking about at all." (A. 909.)

As it had done in its previous 1965 summary judgment order, the District Court referred the matter to a Master with broad powers to determine appropriate relief. (A. 683-84.)

Opinion Of The Court Of Appeals

The Court of Appeals reversed the summary judgment order and remanded the case for trial on the question of liability. It held that the proxy statement should have been phrased differently, but ruled that the District Court should inquire whether "the merger would have received a sufficient vote even if the proxy statement had not been misleading in the respect found." (A. 1013.)

With respect to the deficiency, the Court of Appeals viewed the matter as one solely of emphasis, the use of boldfaced type to express the board's recommendation being decisive. The court said:

> "Had the proxy statement simply reported approval, without emphasis and along with the other facts, we might have a different situation." (A. 1009.)

It held

> "as a matter of law that in the light of the board's statements recommending and giving opinions favorable to the merger with failure to give similar emphasis to the relationship with Mergenthaler was the omission of a material fact necessary to make the laudatory statements not misleading." (A. 1014.)

The court conceded that "several facts pertinent to the relationship between the eleven members of the Auto-Lite board and Mergenthaler do appear in portions of the proxy statement" (A. 1006) and that:

> "[T]he proxy statement contains information which would indicate to those aware of corporate mechanism that Mergenthaler had the power to select a majority,

> if not all, the members of the [Auto-Lite] board, may well have exercised it, and that a minority, at least, were directors of both [Auto-Lite and Mergenthaler]." (A. 1007.)

The Court of Appeals held that respondents would have the burden of proving "by a preponderance of probabilities" that the merger would have been approved even had there not been misplaced emphasis in the proxy statement. The court also stated that the question of fairness of the merger "does bear on the cause question." (A. 1012-13.)

SUMMARY OF ARGUMENT

The Court of Appeals erred in concluding that the merger proxy statement was defective because it used boldfaced type to set forth the recommendation of the Auto-Lite board that the merger be approved without giving "similar emphasis" to the relationship between Mergenthaler and Auto-Lite. This relationship was spelled out in a variety of ways, so that no shareholder could help but have known of its existence. Immediately preceding the board's recommendation, the shareholders were told that Mergenthaler owned 54% of Auto-Lite's stock and intended to vote in favor of the merger. The proxy statement went on to disclose that Mergenthaler held a "majority" and "controlling" interest in Auto-Lite, that no other shareholder owned more than 10% of the Auto-Lite stock, that the directors of Auto-Lite and Mergenthaler were interlocking, and that Auto-Lite had been treated as a "consolidated subsidiary" of Mergenthaler. Significantly, the SEC, which reviewed and cleared the proxy statement, had full knowledge of the use of boldfaced type setting

forth the board's recommendation, and had only two months earlier completed extensive proceedings involving the very control relationships now alleged to have been under-emphasized.

In any event, as the Court of Appeals properly held, it would be impermissible to impose liability without trial solely on the basis of a misplaced emphasis in the proxy statement, and without inquiry into the facts and circumstances surrounding the merger. Respondents are entitled to their day in court. Rule 14a-9 requires that an alleged omission be judged "in light of the circumstances under which it is made. . . ." Liability can only be imposed upon consideration of circumstances such as the gravity of the alleged omission, the nature of the matter under consideration, petitioners' deliberate decision not to seek preliminary relief, and the fairness of the merger. The merger terms were fair, and, as the government concedes, the alleged deficiency did not pertain to those terms.

Moreover, considerations of policy will not support a rule applied to consummated transactions which imposes automatic liability without trial merely on a showing that a proxy statement should have been phrased differently. This rule may be proper where an injunction is sought prior to the shareholder vote. Then courts need not inquire into circumstances such as fairness or make retrospective judgments as to the effect of a defective statement on the vote. Where the transaction has been completed, the procedure adopted by the Court of Appeals affords the only proper solution by placing the burden of proof on respondents to show that the defect did not have an effect on the vote. A contrary rule as suggested by the government, which

automatically imposes liability in all cases without trial, would not provide an impetus to prompt action on the part of claimants.

Certainly, fees and costs should be awarded only to diligent shareholders whose action has benefited the corporation. The government's suggestion of an interim fee award in all cases would encourage parties with knowledge of defects in proxy material to defer assertion of claims until it is too late for the corporation to take corrective action. Corporate suffrage is better served by a rule which allows the correction of proxy material prior to the shareholder vote.

Finally, there is no support for petitioners' assertion that a defect in a proxy statement requires voiding the transaction and retrospectively unwinding the merger. Petitioners take the extreme position that there can be no inquiry into the fairness of the merger terms. Their position would cause great hardship to innocent third parties and to the very shareholders whom petitioners purport to represent. Respondents agree with the government that such a Draconian approach to remedies is ill-founded.

ARGUMENT

I.

THE PROXY STATEMENT MADE A FULL AND FAIR DISCLOSURE OF THE RELATIONSHIP BETWEEN AUTO-LITE AND MERGENTHALER.

The Auto-Lite shareholders were more than adequately advised of the relationship between the respondent companies. The proxy statement disclosed on page two that:

> "Mergenthaler, which owns approximately 54% of the outstanding shares of Electric Autolite, intends to vote in favor of approval of the Agreement of Merger." (A. 30.)

It was only following this disclosure that the Auto-Lite board stated its recommendation in boldfaced type that the merger be approved. The immediate and clear attention given to Mergenthaler's majority position and intention to vote in favor of the merger was by itself sufficient to cause any minority shareholder to scrutinize the merger terms carefully. The proxy statement went on, however, and in explicit, complete and repetitious terms spelled out Mergenthaler's controlling stock interest in Auto-Lite and the relationship between the boards of the two companies.

The shareholders were repeatedly informed under appropriate, carefully indexed headings that Mergenthaler had a 54% interest in Auto-Lite; that American had a 33% interest in Mergenthaler; that no one else owned more than 10% of either Mergenthaler or Auto-Lite; that the directors of the two companies were interlocking; that all the Auto-Lite directors, including those who were not common to the Mergenthaler board, would serve on the

board of the surviving corporation; that Mergenthaler controlled Auto-Lite and in turn was controlled by American; that Auto-Lite was Mergenthaler's "consolidated subsidiary"; and that Mergenthaler as majority shareholder in Auto-Lite intended to vote in favor of the merger. (A. 30, 34, 38, 39, 49-51, 61, 63, 65, 71, 74, 76, 77, 78, 79, 81.)

The proxy statement thus fully met the criterion thought to be relevant by the Court of Appeals: "whether the minority shareholders were sufficiently alerted to the board's relationship to their adversary to be on their guard." (A. 1009.) A proxy violation cannot be posited on the unwarranted assumption that the Auto-Lite shareholders read the sentence set forth in boldfaced type on page two, upon which the Court of Appeals focused, and ignored all other disclosures, including the material which immediately preceded the board's recommendation. Any reasonable reading of the proxy statement would disclose to the Auto-Lite shareholder that—in the Court of Appeals' words—his "adversary" was in a control relationship to Auto-Lite. (A. 1009.)

Auto-Lite cannot be faulted, as the Court of Appeals would have it (A. 1007), for placing some of the information concerning its relationship to Mergenthaler later in the proxy statement than the board's recommendation of the merger. The intervening information, which contained detailed financial facts concerning the companies and the proposed merger, was critical material for any shareholder who wanted to make an informed judgment on the primary question before him—whether the merger would benefit his investment interest. Further, inclusion of this information is specifically required by SEC Regulations. Items 14 and 15, Schedule 14A (17 C.F.R. 240.14a-101).

Significantly, when the SEC reviewed and cleared the proxy statement prior to its distribution to the Auto-Lite

shareholders, it was fully aware of all the facts relied upon by the Court of Appeals in finding the existence of a violation: (1) that boldfaced type was used to express the board's recommendation of the merger, and (2) that certain of the facts relating to the control relationship between Auto-Lite and Mergenthaler were set forth in a subsequent portion of the proxy statement. This control relationship had been the subject of extensive public hearings before the SEC. As a result of these hearings, approximately two months prior to clearance of the Auto-Lite proxy statement, the full Commission had issued an order exempting American from the provisions of the Investment Company Act. 41 S.E.C. 415.[6]

While the clearing of the proxy statement by the Commission is not to be taken as its imprimatur, "some force" must be given to the clearance "in a case such as this where the omissions were of facts well known to it." *General Time Corp.* v. *Talley Indus., Inc.*, 403 F.2d 159, 163 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969).[7] See also SEC brief (p. 25) in *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), and this Court's opinion there. 377 U.S. at 432.

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[6] The SEC staff made suggestions concerning the content of the proxy statement and requested certain changes which were adopted. The SEC was particularly interested in Mergenthaler's controlling relationship to Auto-Lite, since that relationship was directly pertinent to accounting principles such as "pooling of interests" used in the proxy statement. (A. 32.) The SEC did not request that the boldfaced type be eliminated nor did it request that the disclosures of the controlling relationship be stated differently.

[7] In *General Time*, the alleged deficiency was based upon the failure to refer to certain proceedings under the Investment Company Act. The court specifically gave "some force" to the SEC's clearance of the proxy statement since it had knowledge of those proceedings. 403 F. 2d at 163.

The Auto-Lite proxy statement was in full conformity with the Commission's Rules. It emphasized all relevant facts with respect to the relationship between Auto-Lite and Mergenthaler by repeatedly placing them throughout the proxy statement in both narrative and tabular form. The courts below thus erred in concluding that, as a matter of law, the proxy statement was misleading.

II.

SUMMARY JUDGMENT OF LIABILITY SHOULD NOT BE GRANTED WITHOUT CONSIDERING THE CIRCUMSTANCES SURROUNDING THE CHALLENGED TRANSACTION.

SEC Rule 14a-9 prohibits the issuance of proxy material

> "... *which, at the time and in the light of the circumstances under which it is made,* is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. 240.14a-9. (Emphasis added.)

Despite the clear language of this Rule, respondents have not yet had a hearing as to the circumstances under which the statements contained in the proxy material were made. It is for this reason that the Court of Appeals reversed the summary judgment ruling of the District Court and remanded this case for trial. Petitioners and the government seek affirmance of the District Court's summary judgment of liability. They would deny respondents their day in court on the very issues which must be resolved under the Rule as prerequisite to a finding of liability.

A.

No Finding Of Liability Can Be Made Until The Alleged Defect Is Judged In Light Of The Relevant Circumstances.

All relevant circumstances must be considered in determining whether respondents should be held liable for a violation of the Proxy Rules. Among the considerations which would be developed at trial are: the gravity of the omission; the nature of the matter being voted upon; the percentage of the vote needed and received; the interests of innocent third parties; the attractiveness of the merger; and the stage of transaction at which relief is sought (whether pre-vote or post-vote). As we will show, none of these considerations here warrant the imposition of liability in absence of trial.

The omission alleged here is not of major import. The government's brief assumes for the purpose of argument that the Auto-Lite proxy statement, which it had previously cleared, should have been phrased differently. It concedes, however, that this assumed defect ". . . did not relate to the terms of the merger." (Gov't Br., pp. 10, 18.)

Although petitioners sprinkle their brief with epithets such as "fraud" and "conflict of interest" (pp. 10, 13, 19, 27, 28, 36-38, 41-43, 48, 51-55, 59, 65, 66, 68, 69), such issues cannot be resolved against respondents on this record. No fraud or breach of fiduciary duty has been shown, and, indeed, such charges have been affirmatively denied. (A. 652-74.) The deficiency found was a misplaced emphasis—not an affirmative concealment or a knowing misstatement of material fact.

The prime question the minority Auto-Lite shareholders were voting upon was whether the merger would benefit their investment interests. The extensive financial and business details contained in the 108-page proxy statement have not been found to be in any way incorrect.

In addition to Mergenthaler's 54% holding, the percentage of outstanding shareholder votes needed to secure approval of the merger was relatively small—only 13%. The Auto-Lite shareholders overwhelmingly approved the merger terms, which were scrupulously and accurately described in the proxy statement. Petitioners themselves admit they were not misled when they voted against the merger. (A. 821, 865.) Since, as the Court of Appeals noted, "nothing in the record indicates dissatisfaction with the merger on the part of any shareholders who voted for it" (A. 1012), it would strain credulity to hold as a matter of law that the vote would have been different had the proxy statement omitted the use of boldfaced type.

Any imposition of liability in this case must be viewed in light of its effect on the intervening interests of third parties. In the more than six years since the merger, thousands of shares in the merged corporation, now called "Eltra," have changed hands. There are 15,643 Eltra shareholders. Of those, over 7,000 have become shareholders since the merger. Professor Loss states that a plaintiff's burden of establishing a violation of the proxy rules should become "increasingly difficult . . . when the rights of innocent third parties have intervened." 2 L. Loss, *Securities Regulation* 961-62 (2d ed. 1961).[8]

[8] Significantly, none of the cases cited by petitioners in support of automatic liability involved innocent third parties. Those cases involved gross fraud, and the relief was directed against wrongdoers only. In *SEC* v. *Capital Gains Research Bureau, Inc.*,

The Court of Appeals correctly decided that one factor which would "bear" directly on the question of liability is the "fairness" of the proposed merger—the very question the shareholders were voting upon. There is no basis for the government's statement that the court's opinion sets up fairness as a "complete defense." (Gov't Br., p. 13.) All the Court of Appeals directed, and all that respondents ask, is that the trier of fact examine the fairness of the merger together with all other circumstances as required by Rule 14a-9.

Even a cursory view of the circumstances surrounding the merger indicates why the Auto-Lite shareholders considered the merger to be attractive. Facts disclosed in the proxy statement, such as Auto-Lite's dependence on the fluctuating automotive market, its loss of considerable Chrysler business, and Auto-Lite's low earnings, must have formed part of the decision of the Auto-Lite shareholder who voted to approve the merger. He was given convertible preferred stock guaranteeing a larger dividend than he received as an Auto-Lite shareholder, a fixed return in the case of declining earnings, and the option of realizing equity appreciation by converting to common stock in a combined company that would have more market appeal—an option which nearly all the shareholders have exercised.

(footnote continued)

375 U.S. 180 (1963), this Court was called upon to consider the imposition of a "mild prophylactic," enjoining investment counselors from refusing to disclose their unfair practice of "scalping" in future transactions. 375 U.S. at 193. *Wolf* v. *Weinstein*, 372 U.S. 633 (1963), imposed the highest standards of conduct upon any "persons performing fiduciary functions" (insiders) in bankruptcy reorganizations. The court in *Eastside Church of Christ* v. *National Plan, Inc.*, 391 F.2d 357 (5th Cir.), *cert. denied*, 393 U.S. 913 (1968), was concerned with a single bond sale effected by an unregistered dealer of securities with respect to a single customer. The court there expressly limited its holding, and the relief given, to two-party transactions. 391 F.2d at 363.

Professor James Lorie's independent financial analysis establishes that the Auto-Lite minority shareholders received more than the fair value of their Auto-Lite stock in the merger exchange. (A. 560-63.)[9] Indeed, the wisdom of their vote approving the merger has been borne out by the market, since their investment has substantially increased.

An additional factor present in this case is petitioners' deliberate delay in seeking corrective relief. Since an alleged deficiency in a proxy statement can easily be corrected if called to the attention of management, the SEC or a court, the possible salutary effect of petitioners' suit was lost when they elected not to advise anyone of their objections prior to the shareholder vote.[10] Where a shareholder deliberately waits until the last minute before seek-

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[9] While petitioners contend that fairness is irrelevant, they assert that the merger resulted in a $12 million loss to the shareholders. (Br., pp. 5, 67.) This contention is based on an absurd comparison between *book* value of the Auto-Lite stock exchanged and the *par* value of the convertible preferred stock received. Neither is valid as the determining factor in measuring the value of a publicly held company. See, *e.g.*, *Brundage* v. *New Jersey Zinc Co.*, 48 N.J. 450, 226 A.2d 585, 600 (1967); see also B. Graham, D. Dodd, S. Cottle, *Security Analysis* 217 (1962). In the ten years preceding the merger, the market price of Auto-Lite's stock never approached book value. (A. 640-43.)

[10] Petitioners' statement (p. 60) that they did not discover the claimed defect in the proxy statement "until long after" the shareholder meeting is not correct. As noted above (pp. 7-8, *supra*), petitioners decided to file their suit "several weeks" before the shareholder meeting. The complaint filed alleged that the controlling relationship between the respondent companies had not been adequately set forth and that the use of boldfaced type to state the directors' recommendation was misleading. (A. 7-8.)

ing the aid of the court, the standard for imposing liability should be stringent.[11]

Of course, certain instances may arise in which relief can be granted without a complete inquiry into all of the circumstances described above. If, for example, the shareholders are promised something which the corporation does not deliver, a court might well require fulfillment of the promise irrespective of the fairness of the transaction. Where there are flat misstatements or outright fraud pertaining to the very terms of the transaction, liability would be clear. But this case involves no such facts. A rule of automatic liability would unfairly blur the real differences between hypothetical situations and the concrete facts of this case.

B.

The Court Of Appeals Properly Remanded The Case For Trial.

Under Rule 14a-9, a "violation" can be found only after a statement in proxy material is judged "in the light of the circumstances under which it is made . . ." The Court of Appeals looked at only one circumstance—the emphasis and phrasing of the proxy statement—found a "violation," and remanded the case for consideration of the other circumstances. Its use of the term "violation" was a poor choice of words. (A. 1013.) But, by remanding the case for a consideration of all the circumstances surrounding the merger, the Court of Appeals reached the result required by the language of the Rule.

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[11] Judge Friendly in *General Time Corp.* v. *Talley Indus., Inc.*, 403 F.2d 159, 163 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969), condemned the practice of delaying until the day of the shareholder meeting to seek relief, and accordingly required at that time a "strong showing of materiality."

In remanding this case, the Court of Appeals directed the District Court to determine whether there was a "causal relationship" between the deficiency found in the proxy statement and the merger. (A. 1012.) Reference to that determination as "causal relationship" is understandable in the light of this Court's statement in *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964):

> "... the causal relationship of the proxy material and the merger are questions of fact to be resolved at trial, not here."[12]

Professor Loss has stated with respect to this ruling:

> "... [T]here are a number of other proxy opinions on causation—enough of them in the immediate wake of *Borak* to make it apparent that causation has now become the critical question in this area." 5 L. Loss, *Securities Regulation* 2933 (2d ed. Supp. 1969).

"Causal relationship"—a precondition of liability in virtually all areas of the law—is an important policy tool which insures that acts are weighed within their factual context so as to achieve a result in accordance with the goals sought to be protected.[13] Whether this process in the securities field is denominated "causal relationship" or "materiality", or simply framed in the language of Rule 14a-9, something more must be shown than that the proxy statement contained a misplaced emphasis. The deficiency

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[12] The proxy statement in *Borak* had precisely the same function as the one in this case. It, too, solicited proxies necessary for approval of the merger. If, as the government suggests, causation is shown merely by the fact that a proxy statement was used to secure approval of a merger, it would have been superfluous for this Court in *Borak* to refer the issue of "causal relationship" to the trial court.

[13] See, *e.g.*, 5 A. Corbin, Contracts §1019 (1964); W. Prosser, Torts 242-45 (3d ed. 1964); C. McCormick, Damages 269-70 (1935); Smith, *Legal Cause in Actions of Tort*, 25 Harv.L.Rev. 103, 233 (1911); Ryu, *Causation in the Criminal Law*, 106 U.Pa. L.Rev. 773 (1958).

in a proxy statement, whether constituting a misemphasis, misstatement, or omission, must be judged in light of all the relevant circumstances.

This Court in *Borak* made it clear that one of the chief purposes of the securities laws, set forth in the statutory language itself, is the protection of the shareholders' investment:

> "While this language [Section 14(a)] makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." 377 U.S. at 432.

This fundamental statutory objective would in no sense be served in this case by automatic and mechanical application of rules of liability which can only serve to jeopardize the shareholders' financial interest and disenfranchise those shareholders who wanted the merger and benefitted from it. The fairness of the merger and the protection of the shareholders' investment should be of major concern to the trier of fact.

In addition, any ruling which negates causal relationship as a meaningful concept in Section 14(a) cases will have an identical effect in Section 10(b) litigation. In *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 468 (1969), this Court equated Sections 10(b) and 14(a) in merger cases. As Professor Bromberg has noted, the elimination of causation from the securities law "would expose issuers, insiders, and perhaps others to immense liabilities for relatively minor misconduct." A. Bromberg, *Securities Laws: Fraud—SEC Rule 10b-5* 220 (1969). It is respectfully suggested that the government has not fully considered all of the ramifications of the position which it urges this Court to adopt.

C.

A Rule Of Automatic Liability Would Deny Respondents Their Day In Court.

Both petitioners and the government maintain that liability must flow from any defect in a proxy statement, irrespective of the surrounding circumstances. The premise underlying this position is that summary judgment should be the standard vehicle for establishing liability in securities cases. The government concedes that issues such as fairness are relevant, but only with respect to relief. (Gov't Br., p. 15.) Petitioners go further, contending that fairness is irrelevant, either with respect to liability or relief. (Pet. Br., pp. 68-69.)

There are several reasons why a rule of automatic liability without trial should not be adopted by this Court. First, the language of the Rule itself requires inquiry into the circumstances under which statements in proxy materials are made prior to a finding of liability. Second, serious consequences flow from a finding that a corporation has violated the securities laws. Third, summary judgment should not be used indiscriminately to displace trials in the resolution of securities claims.

The government as amicus concedes that the District Court must at some point consider the fairness of the merger. Prudence dictates that this inquiry be made prior to a determination of liability. Adverse consequences must, of course, flow from the imposition of liability. The Second Circuit recently emphasized in *Globus* v. *Law Research Service, Inc.*, CCH Fed. Sec. L. Rep. ¶ 92,474, at p. 98,240 (2d Cir. 1969), that "there always lurks the psychological deterrent of being branded a knowing violator of the law. This is particularly true in an industry [dealing in securi-

ties] where, as the sages put it, a good name is worth more than a crown." The label of "violator" is not to be lightly imposed without trial, especially where, as here, there has been no showing of fraud, the SEC cleared the proxy statement, and the terms of the merger were fair to the shareholders and were overwhelmingly approved by them.

Petitioners and the government seek a rule which would abrogate respondents' right to a trial on the issue of liability—a step which the Court of Appeals would not take. It is significant in this regard that neither court below was willing to make a finding of liability based solely upon what they felt to be an inadequate disclosure in the proxy statement. The District Court felt that some other element was necessary: the impact of the merger on the national economy and the public attitude toward conglomerates and the antitrust laws. The Court of Appeals likewise felt the need of finding an additional element, which it called "causal relationship."

It would be improper to circumvent the trial process where the SEC's own Rule requires an inquiry into the circumstances. This Court's warning in *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948), is pertinent here:

> "[S]ummary procedures, however salutory where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice."

Petitioners and the government claim that any inquiry into the circumstances here is impossible because the trier of fact cannot "reconstruct the balloting" or test "whether or not the result of the shareholder vote would have been

different." (Pet. Br., p. 22; Gov't Br., p. 12.) In a Section 14(a) case, the trier of fact necessarily must at some point make a determination as to the probable effect of any omission on the challenged transaction. The suggestion that such a process is impractical or impossible simply ignores the very nature of the claim asserted. It further assumes the inability of courts to make determinations which they have been making since the inception of Anglo-American law.

Respondents repeatedly requested that this case proceed to trial. (A. 460, 465, 471-72, 691-92, 743, 759, 763, 776, 873, 886, 898-99, 902.) They are not to blame for this case languishing in the District Court. Indeed, they urged that summary procedures would ultimately prolong the litigation. (A. 745-46, 748-49, 751-52.) This case presents "another mistaken effort to save time by an attempt to dispose of a complicated state of facts on motion for summary judgment." *Bozant* v. *Bank of New York*, 156 F.2d 787, 790 (2d Cir. 1946) (L. Hand, J.).

Fairness to all parties concerned necessitates a trial where the facts concerning the merger can be fully presented. No defendant, big or small, should be deprived of his day in court.

III.

THE PRACTICAL PROBLEMS ENVISIONED BY THE GOVERNMENT CAN BE RESOLVED WITHIN THE RATIONALE OF THE COURT OF APPEALS BY A RULE ENCOURAGING PROMPT CORRECTIVE ACTION.

If this Court concludes that the proxy statement was defective in its emphasis, this case raises questions as to the allocation of the burden of proof and as to the point in time at which fees and costs should be awarded.

The government as amicus does not address itself to the question whether the proxy statement here should have been phrased differently, but assumes the existence of a material omission. Based on this assumption, it suggests that liability should automatically follow in order to expedite public and private enforcement of the SEC Rules. The purposes of the securities laws can better be served without short-circuiting a meaningful inquiry into the facts of this case. Furthermore, the government's suggestion, if applied in all cases, will not encourage prompt action on the part of those who challenge proxy material.

The government's position may have merit where a hearing on the claim is held prior to the shareholder vote. At the pre-meeting stage, courts need not inquire into circumstances such as fairness or the effect of a defective statement on the vote. But the government's suggestion does not provide a complete answer where, as here, the shareholders have voted and the merger has taken place. In such a situation, there are other circumstances present, and placing the burden of proof on respondents to show them (as was done by the Court of Appeals) is the only rational method for giving full effect to the standards set forth in Rule 14a-9. Adoption of a minimal test for liability at the pre-meeting stage when there are fewer circumstances to consider will encourage complainants to act diligently.

Prior to the shareholder meeting the ease with which relief may be granted and the salutary effect of such relief on shareholder suffrage justifies a minimal test of liability. At that point, proxy material can be easily corrected and the meeting postponed if necessary. Federal courts faced with the practicalities of securities litigation have recognized that "the application for a preliminary

injunction is the time when relief can best be given." *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947 (2d Cir. 1969). In fact, they have found it so desirable to have proxy material passed upon before the shareholder vote that they have adopted a test of liability in pre-meeting cases less stringent than that applied where retrospective relief is sought. *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692, 698 (2d Cir. 1966); see also *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540, 547 (2d Cir. 1967) (10b-5 case). Awarding of attorneys' fees to successful litigants at the injunctive stage would serve as an additional incentive to prompt assertion of claimed violations of the Proxy Rules.

Once a meeting has been held and the transaction consummated, the elements of a claim for monetary damages or rescission differ significantly from those in an action seeking only injunctive relief. See *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 192-93 (1963).[14] The corrective relief which petitioners would have received at the preliminary stage, when contrasted with that which

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[14] Professor Loss notes:

"Furthermore, whether in actions under the SEC rules or in nonstatutory actions based on alleged misstatements in the solicitation of proxies or allegations of other improprieties or threatened improprieties in voting, it should become increasingly difficult to arouse the chancellor's conscience as the plaintiff proceeds from (1) a prayer merely to postpone the taking of the vote to (2) a prayer to enjoin the consummation of the action approved by the vote to (3) a prayer to set aside the action after its consummation. This should be especially true when a substantial period has expired since the vote or when the rights of innocent third parties have intervened, even apart from traditional laches which may bar a post-meeting plaintiff who had time to sue before the meeting." 2 L. Loss, *Securities Regulation* 961-62 (2d ed. 1961).

they now seek, points up the need for differing tests. Recognizing this, the Court of Appeals noted that had petitioners "timely sought" corrective action prior to the holding of the shareholder meeting, a different case would have been presented. (A. 1011.)

Corporate suffrage is furthered by full disclosure. Yet petitioners deliberately chose to withhold their complaint. If petitioners believed that the shareholders should have had additional or more correct information, they were under a duty to so advise management or the SEC. The SEC has stated that management should be given "an opportunity to avoid . . . defects in the preparation of proxy material." 29th SEC Annual Rep. 53 (1963).

Despite petitioners' deliberate delay, the government suggests that petitioners be awarded interim attorneys' fees and litigation expenses. The government's position, contrary to sound policy, would encourage plaintiffs to lie in wait until it is too late to rectify alleged deficiencies—the very tactics employed here. A lack of an award of interim fees has not deterred the prosecution of complex litigation under the securities laws or in other fields. Fees and expenses are not advanced in antitrust matters, even though cases of that type normally require the retention of accountants and other financial experts. Attorneys have vigorously prosecuted complicated cases with only the incentive of a fee award at the end of the suit.

None of the authorities cited by the government (pp. 21-24) support an interim award of fees. All involved awards made *after* the conclusion of the case on the merits and *after* a fund had been created or some other bene-

ficial result had been achieved.[15] The degree of success and the benefit conferred traditionally have determined the amount of the fee award. Professor Hornstein, upon whom the government relies, points out that, "The test of success . . . is the ultimate result, not the intermediate rulings." *The Counsel Fee in Stockholder's Derivative Suits,* 39 Colum.L.Rev. 784, 798 (1939). Any award of fees should properly await the final outcome of this case.[16]

IV.

THE FINDING OF A DEFECT IN A PROXY STATEMENT DOES NOT REQUIRE UNWINDING THE MERGER.

Petitioners demand relief in two forms, restitution or rescission. Both are based on the assumption that the merger is "void." They claim that their right to these

[15] *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 166 (1939) (plaintiff had preserved 14 other trust funds besides the one of which she was a beneficiary); *Trustees* v. *Greenough,* 105 U.S. 527, 529 (1882) (plaintiff had saved and returned to a trust fund millions of acres of land and considerable amounts of money); *Maggiore* v. *Bradford,* 310 F.2d 519 (6th Cir. 1962), *cert. denied,* 372 U.S. 934 (1963) (plaintiffs had prevented a transaction which would have resulted in a $2,700,000 depletion of corporate assets); *Smolowe* v. *Delendo Corp.,* 136 F.2d 231, 241 (2d Cir.), *cert. denied,* 320 U.S. 751 (1943) (plaintiffs had recovered short-swing profits for the corporation).

[16] The government suggests safeguards which, of course, would be appropriate if prospective fees are allowed. Among these, "the plaintiffs, in order to qualify for reimbursement of their subsequent litigation expenses" should be required "to make a preliminary showing of a substantial possibility that the defendants' proof of fairness might be successfully controverted." Only by adopting safeguards can this Court minimize the "possible abuse" which the government candidly admits is inherent in the allowance of prospective fees and expenses. (Gov't Br., p. 21.)

remedies must be "unobstructed by any inquiry into 'fairness' . . ." (Pet. Br., p. 69.)

Petitioners' request for "restitution" is nothing more than a thinly-veiled attempt to recover damages without any inquiry as to injury. The question of monetary damages is not before this Court and was not considered by either court below. In any event, the government as amicus has covered this point: "Where, as here, the misleading aspect of the proxy solicitation did not relate to the terms of the merger, the stockholders should be entitled to monetary relief only to the extent that they can show they suffered pecuniary damages from the merger." (Br., pp. 10-11.)

Unwinding this merger would be improper and irrational. A decree of rescission would not only injure the investment interests of the Auto-Lite shareholders who have remained shareholders in the merged corporation, but would be wholly unfair to the more than 7,000 persons who have become Eltra shareholders during the six-year period since the consummation of the merger. As the government properly notes, " . . . it is far from certain that the shareholders the plaintiffs represent would wish to have the merger set aside." (Gov't Br., p. 17.) Of all the persons interested in this transaction, including 15,643 Eltra shareholders, only the two petitioners have expressed a desire for rescission.

Neither this Court nor any other federal court has held that Section 29(b) of the Securities Exchange Act requires the voiding of a merger simply because a violation of one of the provisions of the Act has been established.

The "voiding" provision of Section 29(b) does not apply where the rights of innocent third parties have intervened.[17]

This Court in *Borak*, while holding that retrospective relief is available with respect to a consummated merger transaction, expressly disclaimed any intention of setting forth rigid rules as to relief:

> "Our finding that federal courts have the power to grant all necessary remedial relief is not to be construed as any indication of what we believe to be the necessary and appropriate relief in this case. . . . Whatever remedy is necessary must await the trial on the merits." 377 U.S. at 435.[18]

In *A. C. Frost & Co.* v. *Coeur d'Alene Mines Corp.*, 312 U.S. 38 (1941), this Court had before it the question of whether a particular contract to purchase stock was void and thus should be rescinded because the entire issue of securities had not been registered under the 1933 Act. Reversing the lower court's annulment of the contract, this Court held:

> "Here the clear legislative purpose was protection of innocent purchasers of securities. They are given definite remedies inconsistent with the idea that every

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[17] The pertinent provisions of Section 29(b) are not set forth in petitioners' brief. (Br., p. 3.) The omitted language, contained in the government's brief at page 3, provides that a contract shall be void only as against those persons who acquired rights "with actual knowledge of the facts" constituting a violation of the Act. 48 Stat. 903, as amended, 15 U.S.C. §78cc(b) (1964).

[18] In *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 462 (1969), this Court stated that its decision should not be taken as an intimation of "what remedies would be appropriate should a violation be found after a trial on the merits."

> contract having relation to sales of unregistered shares is absolutely void; and to accept the conclusion reached by the supreme court below would probably seriously hinder rather than aid the real purpose of the statute." 312 U.S. at 43.

The corporation formed by the Auto-Lite-Mergenthaler merger is "not inherently unlawful." (See Gov't Br., p. 15.) Accordingly, the antitrust divestment cases cited by petitioners (p. 64) are inapposite.

> "Unlike the antitrust laws—where the motivation for divestiture would be to restore the economic status quo—there is no such compelling policy in the securities laws where the shareholders can be adequately compensated by damages." Fleischer, *"Federal Corporation Law": An Assessment,* 78 Harv. L. Rev. 1146, 1172 (1965).

Respondents and the amicus agree that the drastic remedy of rescission is not required under the facts of this case. Respondents request that this Court so hold.

CONCLUSION

The merger proxy statement more than amply disclosed the relationship between Auto-Lite and Mergenthaler. In any event, liability should not be imposed in this case in the absence of a trial, at which the circumstances surrounding the merger must be considered. Relevant circumstances under Rule 14a-9 would include all of the disclosures which were made, the SEC's clearance of the proxy statement, petitioners' deliberate delay, and the overwhelming attractiveness of the transaction to the Auto-Lite shareholders. This Court should announce

a rule promoting prompt action by persons having knowledge of defects in proxy material. Certainly, not every defect requires the voiding of a consummated transaction and the unwinding of a fair merger, particularly where, as here, the defect found does not relate to the terms of the transaction.

The Court of Appeals properly remanded this case to the District Court for trial. It incorrectly held, however, that the proxy statement violated the Proxy Rules because of its phrasing. Accordingly, the decision of the Court of Appeals should be affirmed in part and reversed in part and this cause remanded to the District Court for trial.

Respectfully submitted,

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